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No. _____

In The

Supreme Court of the United States

October Term, 1995

MINNESOTA COUNCIL OF DOG CLUBS AND AMERICAN DOG OWNERS ASSOCIATION, INC.,

Petitioners,

vs.

CITY OF MINNEAPOLIS, A MUNICIPAL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are parties who prevail on all of the issues in a lawsuit brought against a municipality under the Civil Rights Act of 1964, 42 U.S.C. § 1983 (1988), which results in enjoining enforcement of a state law of general applicability prohibited from an award of reasonable attorney's fees under 42 U.S.C. § 1988(b) (Supp. V 1993) because the law was not enacted by the municipality which was responsible for its enforcement?

PARTIES TO THE PROCEEDING

The parties to this proceeding consist of the following:

Minnesota Council of Dog Clubs, Inc., Petitioner; American Dog Owners Association, Inc., Petitioner; and City of Minneapolis, Minnesota, Respondent.

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REPORTS OF OPINIONS

The opinions delivered in this case are as follows:

1. Ruling of the Minnesota Court of Appeals, dated October 24, 1994, appears at Appendix D and is unpublished;

2. Order and Memorandum Opinion of the Hennepin County District Court, the Honorable Thomas Carey, dated May 25, 1995, appears at Appendix B and is unpublished;

3. A ruling of the Minnesota Court of Appeals appears at Appendix A and is reported at 540 N.W.2d 903 (Minn. Ct. App. 1995);

4. Denial of a Petition for Review by the Minnesota Supreme Court, dated January 25, 1996, appears at Appendix C and is unpublished.

GROUNDS FOR INVOKING JURISDICTION OF SUPREME COURT

Petitioners Minnesota Council of Dog Clubs, Inc., and American Dog Owners Association, Inc., seek review of a ruling made by the Hennepin County District Court, State of Minnesota, on May 25, 1995, as affirmed by the Minnesota Court of Appeals, 540 N.W.2d 903, on December 12, 1995. Petition for review was denied by the Minnesota Supreme Court on January 25, 1996.

The jurisdiction of this Court arises under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case raises questions under the Federal Civil Rights Act of 1964, as amended, 42 U.S.C. § 1983 (1988), and § 1988(b) (Supp. 1993). The respective statutes provide as follows:

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(b):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This case concerns the right of prevailing parties in litigation under the Civil Rights Act 42 U.S.C. § 1983 to recover reasonable attorney's fees and costs, pursuant to § 1988(b), when they succeed in enjoining a city from enforcing a state law that is violative of the U.S. Constitution.

The lawsuit arose under various provisions of a Minnesota statute known as the "Cruelty to Animals Law." Minn. Stat. §§ 343.22 (1994), 343.235 (1994) (amended 1995), 343.29 (1994) (amended 1995). The measure, enacted by the State of Minnesota in 1991, empowered municipal law enforcement authorities to seize, maintain, and ultimately destroy or otherwise dispose of dogs or other animals deemed to be subject to mistreatment by their owners.

The statutes authorized for pre-hearing seizure, without notice to the owners, and further required the owners of the seized animals to seek and obtain injunctive relief within 30 days in order to avoid disposition of their pets or other animals. Minn. Stat. §§ 343.22, 343.235, 343.29. The law also required owners of seized animals to pay the costs of confinement of the animals for 30 days within 7 days of the seizure to prevent destruction of the animal. This amount was not refundable regardless of whether the owners were ultimately determined to be culpable. Minn. Stat. § 343.235. The law contained other provisions that impaired the ability of owners to protect their rights and their animal, including vague terminology used to define offenses and destruction of evidence by law

enforcement authorities following seizure. Minn. Stat. § 343.21 (1994).

This case was initiated by two organizations of pet owners, the Minnesota Council of Dog Clubs, Inc. ("MCDC"), and the American Dog Owners Association, Inc. ("ADOA"), against the City of Minneapolis on October 28, 1993. The lawsuit was brought under the Federal Civil Rights Act of 1964, as amended, 42 U.S.C. § 1983. Prior to the lawsuit, the City had enforced the measure on at least two occasions. A-24. The two organizations claimed that the statutory measures violated a number of constitutional provisions, including the Due Process Clause of the Fourteenth Amendment, as well as parallel provisions under the Minnesota State Constitution.

The Trial Court, the Hennepin County District Court, ruled in favor of the organizations on all of the claims in the lawsuit.

The Trial Court invalidated the statute and enjoined its enforcement in the City of Minneapolis by Order and accompanying Memorandum Opinion on March 27, 1995.[1] The Court reasoned that the statutory provisions, especially the pre-hearing seizure, violated the Due Process Clause of the Fourteenth Amendment. Following the ruling, MCDC and ADOA timely brought a motion for an award of reasonable attorney's fees and costs under 42 U.S.C. § 1988(b).

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[1] Before passing upon the merits, the Trial Court had dismissed the case on grounds of lack of standing by the organizational claimants. That ruling, however, was reversed by the Minnesota Court of Appeals, and the case was remanded for determination on the merits. App. 19-23.

The Trial Court, by Order and accompanying Memorandum Opinion dated May 25, 1995, denied the request for attorney's fees. While the amount of the fees was not disputed, the Court reasoned that an award of attorney's fees was impermissible because the City of Minneapolis did not enact the challenged state law, but merely was the enforcing arm. App. 15.

The organizational claimants appealed to the Minnesota Court of Appeals, which affirmed the ruling below. The Court of Appeals held that an award of attorney's fees is improper under § 1988 against a municipality when enforcing a state law that it did not affirmatively enact itself. The Court reasoned that a municipality cannot be held liable for payment of attorney's fees when its action "was limited to following now invalidated state law to achieve certain enforcement objectives." App. 8; *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 906 (Minn. Ct. App. 1995).

A timely Petition for Discretionary Review by the Minnesota Supreme Court was denied on January 25, 1996.

ARGUMENT

A. Municipal Liability Exists Under § 1988

The issue presented in this case is an important one that should be resolved by this Court. The ruling below refusing to allow an award of attorney's fees conflicts with decisions of other courts, including rulings by at least two Federal appellate tribunals. The issue raised in

this case has not been addressed by this Court, and it should be resolved to eradicate uncertainty resulting from the divergent rulings below.

The Minnesota Court of Appeals, in upholding the denial of attorney's fees, held that when a municipality violates the United States Constitution and 42 U.S.C. § 1983 by enforcing a state law, the municipality cannot be held liable for the claimant's attorney's fees under § 1988. *Minn. Council of Dog Clubs*, 540 N.W.2d at 906. The Appellate Court stated that attorney's fees should not be granted to a prevailing party in civil rights litigation if the enforcing agency, the City of Minneapolis in this case, was only carrying out state law without enacting the measure itself.

The well-established amenability of municipalities and other governmental units to fee awards under the Civil Rights Act is compromised by the ruling in this case. The reasoning adopted by the Minnesota Court of Appeals, barring a fee award when a city enforces a state law, conflicts with the reasoning of this Court and the rulings of a pair of Federal Courts of Appeal, the Fifth and Sixth Circuits.

Municipalities clearly are liable for attorney's fees under § 1988(b). *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 698-699 (1978). As stated in *Monell*:

> [T]he Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights. Therefore . . . there is no justification for

> excluding municipalities from the 'persons' covered by [the Act].

436 U.S. at 700-1.

The importance of imposing fee awards against municipalities was expressed by Congress in enacting the attorney's fee measure. As the Court observed in *Monell*, referring to the Senate's view of § 1988:

> [D]efendants in these cases are often State or local **bodies** or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, **in his official capacity**, from funds of his agency or under his control, or **from the State or local government (whether or not the agency or government is a named party)**.

436 U.S. at 699 (emphasis in original) (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976)). *See also Owen v. City of Independence, Mo.*, 445 U.S. 622, 636, *reh'g denied*, 446 U.S. 993 (1980).

The legislative history of § 1988 further indicates:

> [C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

Monell did place a restriction on the liability of a municipality. A municipality cannot be found liable for

the aberrant behavior of an employee under the respondeat superior doctrine. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). It was in this context the Court held that for "tortious conduct, to be the basis of municipal liability" there must be an "official policy." The court explained:

> The "official policy" requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.

Pembaur, 475 U.S. at 479-480 (emphasis omitted).

The present case does not involve tortious conduct by a city employee or liability under respondeat superior. In this case, liability arises because the City followed a policy of enforcing an unconstitutional state law. App. 24. Thus, the reasoning of *Monell* applies here.

B. The Courts Are Split on the Permissibility of a Fee Award

The ruling below is premised on the notion that a unit of government that only enforces an unconstitutional state law, without exercising any independent legislative action, is not subject to a fee award under § 1988(b). This reasoning is not only flawed, but inconsistent with prevailing case law.

Contrary to the ruling of the court below, a municipality is not immune from imposition of a fee award simply because it is enforcing a state statute. This lawsuit was brought against the City of Minneapolis because it

enforces the measure within its jurisdiction. Since the State does not enforce the law, there is no mechanism by which the State could have been sued in this case. Federal appellate rulings diverge from the reasoning of the court below. In *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994), the court rejected the claim of a municipality that it could not be liable for violation of the Civil Rights Act because its action was consistent with state law. The same is true in this case. The City of Minneapolis chose to follow State law, which makes it subject to declaratory and injunctive relief, as well as an award of attorney's fees to the prevailing parties that achieved those remedies.

Other cases also have imposed liability under the Civil Rights Act and awarded attorney's fees against entities or individuals who participate in the enforcement of unconstitutional state laws, even though the participants did not enact the infirm measure that they sought to enforce.

In *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989), *reh'g granted*, (April 14, 1989), a local sheriff was sued for a single episode of enforcing a state garnishment law. The Court held that the state statute deprived plaintiff of Due Process and awarded attorney's fees against the sheriff. The Court rejected the argument that the sheriff should not be liable for attorney's fees because he was simply enforcing state law, the same contention adopted by the Minnesota Court of Appeals in the present case. The Fifth Circuit in *Jackson* did not accept the position that a governmental official is immune from a fee award under

§ 1988 for enforcement of a defective state law. As the Court held:

> Initially, he argues that garnishment of appellee's wages was a ministerial duty which he was required to perform under state law; that this somehow means that he was not a state actor. We reject this argument. State officials acting pursuant to a state statute are acting under color of state law for purposes of § 1983, **regardless of whether state law gave them any discretion in carrying out their duties.**

868 F.2d at 167-168 (emphasis supplied). As the court concluded in *Jackson*:

> This court has affirmed attorney's fees awarded under § 1988 against officials enforcing an unconstitutional statute, **even though the officials claimed to have no discretion to act otherwise.**

Id. at 168 (emphasis supplied). *See also Johnson v. State of Miss.*, 606 F.2d 635 (5th Cir. 1979) (local officials liable for attorney's fees under § 1988 when enforcing state statute).

But other courts, like the Minnesota Court of Appeals in the present case, have taken a more restrictive view and disallowed a fee award under § 1988 against governmental units that enforce, but do not enact unconstitutional laws or practices. *See Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994); *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir. 1991).

The Minnesota Court of Appeals in the case below held that a fee award cannot be entered against a municipality when it played no part in enacting the legislation that it was enforcing. *Minn. Council of Dog Clubs*, 540 N.W.2d at 906.

The rule of law adopted by the Minnesota court also clashes with this Court's reasoning in *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980). In that case, the State Bar of Virginia was sued for its part in enforcing a lawyer disciplinary code prohibiting advertising found to be unconstitutional. Initially, the district court held it would be unjust to award fees against the State Bar because it had recommended that the prohibition be amended, but the Virginia court which promulgated the ethics code, refused to enact the proposed amendment. But this Court reversed, holding that the State Bar was susceptible to a fee award under § 1988, stating:

> We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction.

Id. at 739.

The Minnesota Court of Appeals, in its ruling below, deemed it inappropriate to award attorney's fees under § 1988 because the financial impact would fall on municipal taxpayers who were not responsible for enactment of

the challenged measure. This position has been repeatedly rejected by this Court and others. *See Hutto v. Finney*, 437 U.S. 678, 693-700 (1978), *reh'g denied*, 439 U.S. 1122 (1979) (Eleventh Amendment does not bar recovery of attorney's fees from state officers acting in their official capacities); *Maher v. Gagne*, 448 U.S. 122 (1980) (Eleventh Amendment does not bar a federal court from awarding fees against a state); *Consumers Union*, 446 U.S. at 739; *Aware Woman Clinic, Inc. v. City of Cocoa Beach*, 629 F.2d 1146, 1149-50 (5th Cir. 1980).

The position espoused by the City would be antithetical to the purpose of § 1988.

> [F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

City of Riverside v. Rivera, 477 U.S. 561, 577-578 (1986) (alteration in original) (quoting S. Reg. No. 1011, 94th Cong., 2d Sess. 2 (1976)).

In sum, there are two prevailing currents in the case law concerning the issue posed in this litigation: whether an award of attorney's fees is permissible against inferior governmental bodies that carry out a law or policy deemed violative of 42 U.S.C. § 1983 without actually enacting the controverted measures. Some courts, including the Fifth and Sixth Circuits, impose fee liability under

§ 1988 while others, including the Fourth and Seventh Circuits and the court below in this case, refrain from doing so as a matter of law in interpreting the Federal Civil Rights Act and the scope of this Court's ruling upholding municipality liability in *Monell*. Accepting the Petition in this case can help resolve this dichotomy.

C. Public Policy Supports a Fee Award

There are important policy reasons warranting review by this Court of this issue. Civil rights litigation is an important way of assuring compliance with constitutional requirements and preventing abridgements of fundamental, civil and constitutional rights.

The reasoning of the Court below would eviscerate attorney's fees in many cases arising under the Civil Rights Act.[2] A state could pass an unconstitutional statute to be enforced by local units of government as in the present case. Whenever an individual successfully challenged the unlawful measure, the prevailing party would not be entitled to attorney's fees. In this way, a state could eradicate any liability for attorney's fees under § 1988 for unconstitutional measures.

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[2] The importance and recurring nature of this issue is reflected in data obtained from the 1995 Report of the Proceedings of the Judicial Business of the United States Courts. It indicates that in 1995, 38,731 civil rights cases were commenced in the U.S. District Courts alone. Report of the Proceedings of the Judicial Business of the United States Courts (1995), Table C-2A.

This outcome would be antithetical to sound public policy. Awards of attorney's fees are important artillery in the arsenal of the Civil Rights Act to deter violations of law and, more importantly, to encourage and reward successful litigants. The attorney's fees provision of the Civil Rights statute, 42 U.S.C. § 1988, was passed in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), which reaffirmed the "American Rule" that attorney's fees not be awarded unless there is a specific statute authorizing a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The legislative history of § 1988, as recognized by this Court, indicates:

> The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976). Accordingly, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S.Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5912 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)).

Hensley, 461 U.S. at 429.

Congress and this Court recognized that Civil Rights claims often do not involve large monetary damages and often involve rights beyond those of an individual:

> Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit " 'does so not for himself alone but also as a "private attorney general," vindicating a policy

> that Congress considered of the highest importance.' " House Report, at 2 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney).

Riverside, 477 U.S. at 575.

Cases in which monetary relief is not sought, like the present case, would be extremely dubious to pursue without the attorney fee provision. In enacting 42 U.S.C. § 1988, Congress recognized the public importance of these types of civil rights claims.

> [A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See *Carey v. Piphus*, 435 U.S. 247, 266 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. . . . " *Hensley*, 461 U.S. at 444, n.4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.

Riverside, 477 U.S. at 574.

Refusing to grant a fee award to parties who prevail in civil rights litigation discourages potential plaintiffs

from asserting constitutional rights and rectifying infringement of those rights, particularly when injunctive relief alone is sought and not monetary damages. The unavailability of attorney's fees in this type of case will deter these plaintiffs and others from asserting their constitutional rights.

Many constitutional infringements, as reflected in this case, arise under state laws which are enforced by municipalities or other subordinate governmental bodies. Under the reasoning below, states could enact constitutionally odious measures, with enforcement to be carried out by inferior units of government. When they do so, parties whose rights are infringed may be unable, or unwilling as a practical matter, to pursue vindication of those rights because of the economic realities of litigation and the unavailability of attorney's fees should they prevail.

This Court has consistently recognized the importance of fee awards under § 1988 in civil rights litigation. The lower courts, both at the federal level and, as evidenced by this case, the state level, are in a quandary with respect to carrying out this principle when litigation is brought against governmental units or individual government employees who are enforcing laws of general applicability over which they have no control. Both litigants and enforcing agencies would benefit from clarification and resolution of their rights and obligations under the Civil Rights Act in these circumstances.

CONCLUSION

Accordingly, Petitioners Minnesota Council of Dog Clubs, Inc. and American Dog Owners Association, Inc., respectfully request that this Court exercise its discretion and accept this Petition for Writ of Certiorari.

Respectfully submitted,

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April 9, 1996

APPENDIX A

MINNESOTA COUNCIL OF DOG CLUBS, et al., Appellants,

v.

CITY OF MINNEAPOLIS, Respondent.

No. C4-95-1284.

Court of Appeals of Minnesota.

Dec. 12, 1995.

Syllabus by the Court

Attorney fee award sought pursuant to 42 U.S.C. § 1988 is not available in an action asserted against a municipality for merely enforcing state law under 42 U.S.C. § 1983 and the Declaratory Judgment Act, Minn.Stat. §§ 555.01-.16, in which the district court found provisions of the Cruelty to Animals Act, Minn.Stat. §§ 343.22, 343.235, 343.29, unconstitutional.

Marshall H. Tanick, Teresa J. Ayling, Mansfield & Tanick, P.A., Minneapolis, for Minnesota Council of Dog Clubs.

Surell Brady, Minneapolis City Attorney, Timothy S. Skarda, Assistant City Attorney, Minneapolis, for City of Minneapolis.

Considered and decided by CRIPPEN, P.J., and RANDALL and FORSBERG, JJ.

OPINION

FORSBERG, Judge.*

This is an appeal from a judgment denying appellants' request for attorney fees. The underlying lawsuit, brought by appellants Minnesota Council of Dog Clubs and American Dog Owners Association, Inc., challenged the constitutionality of various portions of the Minnesota Cruelty to Animals Act, Minn.Stat. §§ 343.22, 343.235, 343.29. The district court, ruling in favor of appellants, held that the challenged sections were in violation of the Fourteenth Amendment of the United States Constitution and the concurrent provision of the Minnesota Constitution, Article I, Section 7, and enjoined enforcement of the challenged portions within the City of Minneapolis. Appellants then moved, under 42 U.S.C. § 1988, for an award of attorney fees and costs in the amount of $64,727.65. The district court denied the award. This appeal was subsequently brought pursuant to rule 103.03(a) of the Minnesota Rules of Civil Appellate Procedure.

FACTS

Appellants, two nonprofit state and national organizations of dog owners, filed suit in October 1993, challenging the federal and state constitutionality of several provisions of the Minnesota Cruelty to Animals Act, Minn.Stat. §§ 343.22, 343.235, 343.29. Appellants sought declaratory relief pursuant to Minn.Stat. §§ 555.01-.16.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Among its allegations, appellants' complaint referenced 42 U.S.C. § 1983: "Prosecution and enforcement of the Act are undertaken under color of state law within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 1983."

The district court initially dismissed the case on the ground that appellants lacked standing to pursue claims on behalf of their members. This court reversed in an unpublished opinion, *Minnesota Council of Dog Clubs v. City of Minneapolis*, No. C3-94-939, 1994 WL 593912 (Minn.App. Nov. 1, 1994), and remanded the case for further proceedings.

Appellants and respondent then brought cross-motions for summary judgment. The district court granted appellants' motion, holding all of the challenged provisions unconstitutional and enjoining further enforcement of the law in the City of Minneapolis. Subsequently, appellants brought a motion under 42 U.S.C. § 1988 for reasonable attorney fees and costs of $64,727.65. Attorney fees were calculated at $55,300.50, based upon a lodestar of 331 hours multiplied by applicable fee rates, ranging from $50 to $165, out-of-pocket costs of $4,427.15, and a requested "enhancement" of $5,000. Respondent opposed the motion on grounds that it should not be liable for a fee award under section 1988. The district court denied the fee request by an order dated May 25, 1995.

The district court cited three reasons for its refusal to grant attorney fees: (1) respondent's conduct had nothing to do with the constitutional infirmities alleged; (2) respondent had not violated appellants' due process

rights; and (3) appellants' lawsuit only challenged "anticipatory enforcement" of the challenged provisions. Appellants seek reversal of the district court's decision.

ISSUE

Did the district court abuse its discretion by denying attorney fees under 42 U.S.C. § 1988 to appellants who successfully challenged the constitutionality of Minn.Stat. §§ 343.22, 343.235, 343.29 in an action against a municipality for enforcement of state law?

ANALYSIS

1. Standard of Review

The standard of review for an appellate court examining an award of attorney fees and costs is whether the district court abused its discretion. *Radloff v. First Am. Nat'l Bank*, 470 N.W.2d 154, 156 (Minn.App.1991), *review denied* (Minn. July 24, 1991). The Minnesota Supreme Court noted, however:

> Although section 1988 leaves an award of attorney fees to the discretion of the court, the United States Supreme Court requires an award of attorney fees to a prevailing party unless special circumstances would render an award unjust.

Welsh v. City of Orono, 355 N.W.2d 117, 124 (Minn.1984), (citing *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)).

2. Discussion

Appellants' claim for attorney fees was brought pursuant to 42 U.S.C. § 1988 (1988), *amended by* 42 U.S.C. § 1988(b) (Supp. III 1991), which provides:

> In any action or proceeding to enforce a provision of section[ ] * * * 1983 * * * of this title * * * , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1983, in turn, allows a cause of action for

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

It is undisputed that appellants prevailed in the action underlying this appeal. The threshold question that we must address, therefore, is whether appellants properly asserted a claim under 42 U.S.C. § 1983. The United States Supreme Court requires two allegations to state a cause of action under section 1983. Plaintiffs must allege (1) that they were deprived of a federal right and (2) that the person so depriving acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980).

Count I of appellants' complaint states: "Prosecution and enforcement of the Act are undertaken under color of state law within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 1983." This contention is re-alleged in the lawsuit's ensuing counts. Appellants' complaint also specifically states that the challenged portions of the act deprived dog owners of due process and the right to a fair trial in violation of the United States Constitution and the Minnesota Constitution. Appellants' complaint, therefore, explicitly alleges a section 1983 cause of action and identifies a deprivation of federal rights under color of state law.

The Minnesota Supreme Court applied the *Gomez* two-part test for asserting a section 1983 claim in *L.K. v. Gregg*, 425 N.W.2d 813, 818 (Minn.1988). As in the case at bar, *Gregg* involved a request for attorney fees sought pursuant to section 1988. In Gregg, plaintiffs who had brought an action for declaratory and injunctive relief were allowed to recover attorney fees pursuant to section 1988 based on a section 1983 claim. The court never questioned whether plaintiffs were barred from seeking recovery of attorney fees under section 1988 because they had asserted an action for declaratory judgment. The *Gregg* case undermines respondent's argument that appellants are not eligible for attorney fees under section 1988 simply because they asserted claims, pursuant to the Uniform Declaratory Judgment Act, Minn.Stat. §§ 555.01-.16, to which the section 1988 fees being sought are inapplicable. We conclude that appellants properly asserted a section 1983 claim.

Our next consideration is whether municipal liability may be imposed under section 1983 in this case. The

United States Supreme Court first extended section 1983 liability to municipalities in *Monell v. Department of Social Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978).

> Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where * * * the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

The Court ruled that a local government could only be held liable if, "under color of some official policy," it caused violation of another's constitutional rights:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 692, 694, 98 S.Ct. at 2036, 2037-38.

The establishment of a policy or custom divergent from state law is not a prerequisite for imposition of section 1983 liability upon a municipality. A municipality, however, must make a "deliberate choice to follow a course of action * * * from among various alternatives" to sustain section 1983 liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986), *quoted in Garner v. Memphis Police Dep't*, 8 F.3d 358,

364 (6th Cir.1993), *cert denied*, ___ U.S. ___, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994). In this case, the respondent municipality was limited to following now invalidated state law to achieve certain enforcement objectives.

This case, therefore, is distinguishable from *Garner*, a Sixth Circuit case where the court rejected a police department's claim that it could not be held liable for a violation of the Civil Rights Act merely because the department took action consistent with state law. 8 F.3d at 364. The *Garner* court found liability where a police department adopted a more restrictive policy than state law required regarding the use of force to effect an arrest, even though the police department's policy was accordant with state law. *Id.* The court determined that the municipality's enforcement of the state law at issue was a deliberate choice among a variety of alternatives. *Id.* Unlike *Garner*, the respondent in this case was not afforded similar discretion.

This case is also distinguishable from a Fifth Circuit case which held that a sheriff acting pursuant to a state statute was acting under color of state law for purposes of a federal civil rights action regardless of whether state law provided him any discretion in carrying out his duties. *Jackson v. Galan*, 868 F.2d 165, 167-68 (5th Cir.1989). The court in that case awarded attorney fees against the sheriff, rejecting the argument that he should not be liable. *Id.*; *see also Johnson v. Mississippi*, 606 F.2d 635, 637 (5th Cir.1979) (holding local officials liable for attorney fees under section 1988 for enforcing state statute). The holdings in *Jackson* and *Johnson*, unlike this case, however, address individual rather than municipal liability.

It is our conclusion that respondent is not liable for attorney fees in this case for merely following state law. *See Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir.1993) ("Such bounded, state-conferred discretion is not the 'policymaking' authority for which a county may be held responsible under § 1983."), *cert. denied*, ___ U.S. ___, 114 S.Ct. 922, 127 L.Ed.2d 216 (1994).

> It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law.

Surplus Store & Exchange v. City of Delphi, 928 F.2d 788, 791 (7th Cir.1991). Because we find that respondent is not subject to liability, we need not reach any additional considerations.

Finally, it is important to note that if municipalities were to be held liable every time they enforced a state law, the consequences would be horrendous. Any municipality could be financially devastated by a number of such actions. Furthermore, in order to protect itself, a municipality would have to examine every statute passed by the legislature and then decide whether to enforce it. This would produce a spotty and chaotic enforcement policy throughout the state.

DECISION

We affirm the district court's denial of attorney fees and costs sought pursuant to 42 U.S.C. § 1988 to appellants who successfully challenged several provisions of the Cruelty to Animals Act, Minn.Stat. §§ 343.22, 343.235,

343.29, in an action brought under 42 U.S.C. § 1983 against a municipality for enforcing state law.

Affirmed.

RANDALL, Judge (concurring specially).

As the majority correctly sets out, the district court, although giving appellants the decision on the merits, refused appellants' request to impose substantial attorney fees on respondent, the City of Minneapolis. The district court cited its three reasons: (1) respondent's conduct had nothing to do with the constitutional infirmities alleged; (2) respondent had not violated appellants' due process rights; and (3) appellants' lawsuit only challenged "anticipatory enforcement" of the challenged provisions. The district court got it exactly right.

Appellants' claim for attorney fees has brought full circle the original intent behind section 1983 and turned it on its head.

Even a cursory examination of relevant cases shows that its intent was to punish people, including governmental entities, who, under a claimed "color of law" wilfully tried to end-run or violate a citizen's civil rights. It was not meant to financially impair or bankrupt communities and municipalities that are doing nothing other than following mandates of the state legislature.

That from time to time, state and federal courts declare a state or federal law, passed, with the high but rebuttable cloak of constitutionality, unconstitutional, surprises no one. Courts do not kick out legislative actions routinely; but they kick out legislative enactments enough that to declare a law unconstitutional, although

not common, is not rare. If every time the courts declared a law unconstitutional, every municipality, every governmental entity in the state with law enforcement powers that had attempted to enforce what they thought to be good law could be sued, the end result is clear. Legislatures would pass no laws; if they did, municipalities would not enforce them.

The facts in *Owen v. City of Independence, Mo.*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), are instructive. The city of Independence, through unanimous resolution of its council, released to the public an allegedly false statement impugning the police chief's honesty and integrity. *Owen*, 445 U.S. at 627-28, 100 S.Ct. at 1404 The chief was discharged the next day, and the council's accusations received extensive coverage in the press. *Id.* The U.S. Supreme Court found that although the extensive and unfavorable press coverage did not technically "cause" the discharge, the defamatory and stigmatizing charges occurred in the course of terminating the chief's employment. *Id.* at 633-34 n. 13, 100 S.Ct. at 1406 n. 13. Further, the city twice refused the chief's request that he be given written specification of the charges against him and an opportunity to clear his name. *Id.* at 629, 100 S.Ct. at 1404. The United States Supreme Court held that *under these circumstances,* the city's actions deprived the chief of liberty without due process of law. *Id.* at 633-34 n. 13, 100 S.Ct. at 1406 n. 13.

The facts in *Garner v. Memphis Police Dep't*, 8 F.3d 358 (6th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994), are instructive:

> On the night of October 3, 1974, a fifteen year-old, unarmed boy broke a window and entered an unoccupied residence in suburban Memphis to steal money and property. Two police officers, Elton Hymon and Leslie Wright, were called to the scene by a neighbor. The officers intercepted the youth as he ran from the back of the house to a six foot cyclone fence in the back yard. After shining a flashlight on the boy as he crouched by the fence, Officer Hymon identified himself as a policeman and yelled "Halt." He could see that the fleeing felon was a youth and was apparently unarmed. As the boy jumped to get over the fence, the officer fired at the upper part of the body, as he was trained to do by his superiors at the Memphis Police Department. He shot because he believed the boy would elude capture in the dark once he was over the fence. The youth died of the gun-shot wound. On his person was ten dollars worth of money and jewelry he had taken from the house.

Id. at 360. These facts allowed the parents of the deceased to pursue a section 1983 action.

It does not take a detailed analysis of these cases to come to understand why federal courts allowed the suits, including the requests for attorney fees, to move forward. These cases are a far cry from the statute at issue, the Minnesota Cruelty to Animals Act, which was passed in an attempt to protect animals from improper treatment.

Here, appellants' request for attorney fees might be successful if we had something akin to the following facts, which we do not: Acting under color of the Minnesota Cruelty to Animals Act, an animal control officer barges into a house without either a warrant or probable cause, snatches a pet right out of the arms of its owner, berates and verbally assaults the owner on a dubious charge of cruelty to animals and then, without more, stomps out through the door, and brings the animal to a pound.

If those facts could be established, I suspect that the individual law enforcement officer and his employing municipality would not get much sympathy from the courts in an effort to escape the imposition of attorney fees if they tried to hide behind the shield of "we were only operating under color of a good law." But we have nothing remotely approaching an egregious fact scenario here (a careful examination of the cases appellants cite to support their claim for attorney fees shows only egregious fact situations).

In contrast, appellants simply looked at what it thought was an unconstitutional state law and, properly so, went to court and made a claim that the law should be struck down. That they are allowed to do. But then, under the guise of cases built on egregious fact situations, to come into court and demand an additional $65,000 in attorney fees chargeable to the municipality, that they are not allowed to do.

APPENDIX B

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
Minnesota Council of Dog Clubs and American Dog Owners Association, Inc., Plaintiff,	File No. MC 93-18522
vs.	ORDER AND MEMORANDUM
City of Minneapolis, Defendant.	

The above-entitled matter came on for hearing before the Honorable Thomas H. Carey, Judge of District Court, on May 25, 1995, at the Hennepin County Government Center, Minneapolis, Mn. Marshall Tanick, Esq., appeared as counsel for plaintiffs. Timothy Skarda, Assistant Minneapolis City Attorney, appeared as counsel for defendant.

IT IS HEREBY ORDERED:

1. Motion of plaintiff for attorney fees incurred against the defendant, City of Minneapolis, is herein denied.

3. The issue of reasonableness of fees is reserved, in light of the decision made herein.

2. The attached Memorandum is made a part hereof.

There being no just reason for delay, LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ Thomas H. Carey
Thomas H. Carey
Judge of District Court

Dated: May 25, 1995

MEMORANDUM

After reviewing the excellent briefs of counsel, the cases cited, especially *Monnel v. Department of Social Services, City of New York*, 346 U.S. 658, 98 S.Ct. 218 (1978), and *Garner v. Memphis Police Department*, 8 F.3d 358 (6th Cir. 1993), the Court concludes the fees are not warranted to the prevailing party pursuant to the Civil Rights Act.

> "In any action or proceeding to enforce a provision of [Section 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (42 USC Section 1988)

In the proper exercise of discretion, I have to conclude that the fees are not warranted for three reasons:

First, the basis by which this action was brought and the summary judgment granted had nothing to do with the conduct of the City. The plaintiffs were not complaining about the conduct of the City, but rather, the impropriety of the statute itself.

Secondly, the action was not commenced because of anything the City did which was claimed to be a violation of the Civil Rights Act. In fact, the Court notes that

plaintiff wants the state statute enforced relative to the protection of animals and was very pleased that the legislature has enacted a law which provided for neglected animals to be picked up by the local government and cared for. In other words, no one complains that the City of Minneapolis has violated their due process rights. Rather, they are seeking a judicial determination to guard against such eventuality.

Thirdly, their only criticism was the anticipatory enforcement of a disposition option and the failure of the statute to allow a due process method to get the animals back. In remanding the case, the Court of Appeals made it clear that a judicially important and viable issue existed, not because of anything the City had done or any policy they had established, but rather, on the anticipation of what might happen. I am in agreement with the Court's conclusion that an animal owner did not have to wait until their most prized possession had been destroyed before they had standing to stop an unconstitutional legislative provision, but I must disagree with plaintiff's counsel's attempt to convert this into a concept that the City was actually doing, or planning, by policy or otherwise, to do anything wrong.

The City was not the perpetrator but rather caught up in the middle of the problem while attempting to uphold the law, as they are bound to do. The City emphasized their policy of not destroying the property and doing everything possible to reunite the animals with their owners. The Court did not see any evidence nor hear any argument citing actual violations of due process by the City of Minneapolis.

Thus, I feel that the unusual facts of this case require the Court to answer the "$64,000 Question" in the negative.

/s/ T.H.C.
T.H.C.

APPENDIX C

STATE OF MINNESOTA

IN SUPREME COURT

C4-95-1284

Minnesota Council of Dog Clubs, et al.,

Appellants,

vs.

City of Minneapolis

Respondent.

ORDER

(Filed Jan. 25, 1996)

Based upon all the files, records and proceedings herein.

IT IS HEREBY ORDERED that the petition of the Minnesota Council of Dog Clubs and American Dog Owners' Association, Inc. for further review be, and the same is, denied.

Dated: January 25, 1996

BY THE COURT:

/s/ A.M. Keith
Chief Justice

APPENDIX D

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. 480A.08, subd. 3 (1992).

STATE OF MINNESOTA

IN COURT OF APPEALS

C3-94-939

Hennepin County
District Court File No.
9318522

Minnesota Council of Dog Clubs, et al.,

Appellants,

vs.

City of Minneapolis, a municipal corporation,

Respondent.

Forsberg, Judge

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Filed November 1, 1994
Office of Appellate Courts

Considered and decided by Forsberg, Presiding Judge, Parker, Judge,* and Thoreen, Judge.**

---

* Chief Judge Simonett originally heard this case and has subsequently recused herself.

** Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

Forsberg, Judge

Appellants Minnesota Council of Dog Clubs and American Dog Owners Association, Inc., brought suit challenging the constitutionality of the Minnesota Cruelty to Animals Act. Minn. Stat. § 343.20-.37 (1992 & Supp. 1993). Appellants sought a declaratory judgment that certain provisions of the act are unconstitutional, and sought to enjoin enforcement of the challenged provisions. Appellants challenge the trial court's dismissal of their action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. We reverse and remand.

FACTS

Appellant Minnesota Council of Dog Clubs (MCDC) is a non-profit organization of individuals who own dogs and other animals, whose primary purpose is to protect the interests of animal owners by promoting legislation concerning dogs and dog ownership. Appellant American Dog Owners Association (ADOA) is a non-profit New York corporation of individuals and organizations maintaining dogs and other pets for personal, commercial, and recreational purposes throughout the United States. Both organizations include members living in the City of Minneapolis, which has authority to enforce the Minnesota Cruelty to Animals Act. Appellants sought a ruling under the Uniform Declaratory Judgments Act, Minn. Stat. § 555.01-.16 (1992) that certain provisions of the Cruelty to Animals Act violate the privileges of due process and

the right to a fair trial as guaranteed by the United States and Minnesota Constitutions.

Respondent City of Minneapolis brought a motion to dismiss appellants' complaint on the grounds that the trial court lacked subject matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted, and that appellants failed to join all essential parties. Minn. R. Civ. P. 12.02 (a), (e), (f). The trial court found there was no justiciable controversy before it, and dismissed appellants' complaint for lack of subject matter jurisdiction and failure to state a claim. The trial court did not reach the question of appellants' failure to join all essential parties. This appeal followed.

DECISION

Appellants argue the trial court erred in granting respondent's Rule 12.02 motion to dismiss. The issues of subject matter jurisdiction and sufficiency of a claim involve legal questions. On review, this court is not bound by and need not give deference to a trial court's decision on purely legal issues. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

It is well settled that a justiciable controversy must exist before a court has jurisdiction to render a declaratory judgment regarding the constitutionality of a statute. *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 587 (Minn. 1977); *Arens v. Village of Rogers*, 240 Minn. 386, 390-91, 61 N.W.2d 508, 513 (1953). To obtain declaratory relief, a plaintiff must, at a minimum, "possess a bona fide legal interest which has been,

or * * * is about to be, affected in a prejudicial manner." *State ex rel. Smith v. Haveland*, 223 Minn. 89, 92, 25 N.W.2d 474, 477 (1946). Here, the trial court found appellants had failed to show that their organizations or any of their individual members were the subject of an enforcement action against them under the cruelty to Animals Act, or that they were immediately threatened by such an action. The court therefore concluded appellants were unable to show any concrete, legally cognizable interests directly threatened by the Cruelty to Animals Act.

A specific legal action need not be pending, however, before the court may hear a declaratory judgment action. *See Midwest Motor Express, Inc. v. International Bhd. of Teamsters*, 512 N.W.2d 881, 884 (Minn. 1994) (employer allowed to challenge the constitutionality of the Minnesota Striker Replacement Act before any actual proceedings took place under the statute); *see also Baertsch v. Minnesota Dep't of Revenue*, 518 N.W.2d 21, 25 (Minn. 1994) (physicians allowed to challenge portions of the Minnesota Health Right Act prior to its enforcement).

Under the Declaratory Judgments Act, any person whose rights are affected by a statute may have determined any question of construction or validity arising under the statute. Minn. Stat. § 555.02 (1992). We agree with appellants that their rights are affected by the Cruelty to Animals Act, which provides:

> No person shall deprive any animal over which the person has charge or control of necessary food, water, or shelter.

Minn. Stat. § 343.21, subd. 2 (1992). This provision subjects appellants and their members to an affirmative duty

which is neither "hypothetical" nor "abstract." *See Midwest Motor Express, Inc.*, 512 N.W.2d at 883 (constitutionality of state statute was ripe for review).

The Declaratory Judgments Act is remedial in nature and is to be liberally construed to afford relief from uncertainty and insecurity. Minn. Stat. § 555.12 (1992). We believe this case is one where a declaratory judgment action "is singularly appropriate for the resolution of disputes before the commission of wrongs." *Midwest Motor Express, Inc.*, 512 N.W.2d at 884. Accordingly, we reverse the trial court's dismissal of appellants' action and direct it to reinstate appellants' complaint.

Reversed and remanded.

Thomas Forsberg
Oct. 24, 1994

APPENDIX E

CITY OF MINNEAPOLIS
OFFICE OF THE CITY ATTORNEY
300 LINCOLN CENTRE
333 SOUTH SEVENTH STREET
MINNEAPOLIS MN 55402-2453
CIVIL DIVISION FAX #(612) 673-3362

TO: Terry Ayling

OF: Mansfield & Tanick

FAX #: 339-3161

FROM: Jim Moore

TELEPHONE #: 673-2063

DATE: 8-3-93 NO. OF PAGES 2

COMMENTS:

Re: Data Practices Request Dated 7/20/93. Please find attached the Mpls. Animal Control's Policy re: Minn. Stat. Ch. 343. I'm told we have 2 criminal cases in this office related to the above topic. I'll get the names and case numbers to you ASAP.

/s/ Jim

( ) CHECK IF ATTORNEY-CLIENT PRIVILEGED INFORMATION

Patrol Policy #003

Welfare Investigations (Cruelty, Neglect, Inhumane Treatment)

POLICY

Generally complaints regarding the welfare of animals are to be referred to the Animal Humane Society of Hennepin County. There are cases that we will handle, however.

If the Humane Society's cruelty investigators or administrators request our assistance we will investigate and handle the case. We will investigate a welfare complaint if the complaint appears to reveal an imminent danger to the animal's health and survival and the Humane Society is not open for business. (Animal Control is open for longer hours and more days then [sic] is the Humane Society.) We will also investigate a welfare complaint if it is adjunct or incidental to an animal control complaint that is being investigated.

If a warden receives a welfare complaint when the Humane Society is not open the warden should use sound professional judgement to screen the complaint and determine whether it should be handled by our agency or if the complainant should be told to call the Humane Society during their normal business hours.

PROCEDURE

When the Humane Society is *open*:

Refer all cases except –

1. Animal is locked in a car and may be subject to excessive heat. (We handle).

2. A possible welfare violation is at a location where we are investigating a potential animal control ordinance violation. (We would investigate both)

When the Humane Society is *not* open:

Animal Control should handle acute cases, for example:

- Immediate danger or dying or extreme suffering (e.g., beating, torturing)

- No overnight shelter and harsh winter conditions.

The caller should be instructed to contact the Humane Society during their normal business hours for chronic cases, for example:

- No food or water and animal is reasonably healthy

- Chronic injury

- No shelter but conditions are not life threatening

No. 95-1635

(2)

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

MINNESOTA COUNCIL OF DOG CLUBS AND AMERICAN DOG OWNERS ASSOCIATION, INC.,

Petitioners,

vs.

CITY OF MINNEAPOLIS, A MUNICIPAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Minnesota Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

Are parties who prevail in a lawsuit seeking a declaratory judgment against a municipality that results in enjoining enforcement by the municipality of a state law of general applicability entitled to an award of attorney's fees under 42 U.S.C. § 1988(b) (Supp. V 1993) when the municipality was enforcing a state statute without modification, adoption, or change by the municipality.

Is a municipality that enforces a state statute without modification, adoption or change executing a municipal policy or custom that creates a cause of action under the Civil Rights Act of 1964, 42 U.S.C. § 1983 (1988) and liability for an award of attorney's fees under 42 U.S.C. § 1988(b) (Supp. V 1993).

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STATEMENT OF THE CASE

A. Omissions From The Petition

In the underlying lawsuit the Petitioners challenged various provisions of Minn. Stat. §§ 343.22 (1994), 343.235 (1994) and 343.29 (1994) (amended 1995). The Petitioners challenged Minnesota Statutes alone. The lawsuit was brought seeking declaratory judgment under the Minnesota Uniform Declaratory Judgment Act, Minn. Stat. §§ 555.01-.16. The Petitioners did not challenge any particular method of enforcement by the Respondent municipality. The Petitioners alleged no unconstitutional custom or policy of enforcement by the Respondent. The Petitioners did not bring suit against any employee of the Respondent in their individual or official capacities.

The Respondent enforced the state statutes, but did not modify them or incorporate them into municipal policy or procedure. The Petitioners did not challenge any policy or procedure specific to the Respondent. The Petitioners did not challenge any ordinance of the Respondent municipality.

Enforcement by the City of Minneapolis of the disputed statutory provisions was enjoined within the boundaries of the City of Minneapolis. The Order of the Trial Court did not prohibit enforcement by any agency other than the Respondent within the boundaries of the City of Minneapolis. The Order did not prohibit enforcement of the disputed statutory provisions at any other location within the State of Minnesota.

The Trial Court denied the Petitioner's request for attorney's fees. The Trial Court reasoned that the Petitioners were not complaining about conduct of the Respondent and the Petitioners had not claimed that any action of the Respondent City was in violation of the Civil Rights Act. Pet. App. 15.

The Minnesota Court of Appeals in affirming the Trial Court reasoned that a municipality must make a deliberate choice to follow a course of action from among various alternatives to sustain liability under 42 U.S.C. § 1983. Pet. App. 7; *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W. 2d 903, 906, (Minn. Ct. App. 1995). The court concluded that the Respondent was not liable for attorney's fees for following state law.

REASONS FOR DENYING THE WRIT

I.

THE COURTS ARE NOT SPLIT ON THE PERMISSIBILITY OF AN AWARD OF ATTORNEY'S FEES AGAINST A MUNICIPALITY ENFORCING A STATE STATUTE OF GENERAL APPLICABILITY WITHOUT MODIFICATION.

The Petitioners have attempted to articulate a conflict among the courts when none exists. The Petitioners base their assertion of a conflict on the decisions in *Garner v. Memphis Police Dep't*, 8 F.3d 358 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994); *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989), *reh'g granted*, (April 14, 1989); and, *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980).

The Petitioners assert that these three cases are in conflict with the decision of the Minnesota Court of Appeals and the cases relied upon and cited by the Minnesota Court of Appeals.

The decisions in *Consumers Union*, *Garner* and *Jackson* do not conflict with the decision of the Minnesota Court of Appeals. The decisions examine issues different from those in the instant case. The decisions are consistent with the decision of the Minnesota Court of Appeals and with the cases cited therein.

The Minnesota Court of Appeals noted that the instant case was distinguishable from *Garner*. In *Garner*, the court rejected a police department's claim that it could not be held liable for a violation of the Civil Rights Act merely because the department took action consistent with state law. *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994). The *Garner* court found liability when a police department adopted a more restrictive policy than state law required regarding the use of force in making an arrest. The court noted that

> to satisfy the *Monell* requirements a plaintiff must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.

Id. at 364 (citations omitted). The plaintiff met the standard. The *Garner* court determined that the municipality's enforcement of the state law at issue was a deliberate choice among a variety of alternatives. The City of Memphis had a written policy incorporated in general orders. Unlike *Garner*, the Respondent City of Minneapolis did not exercise discretion is selecting among alternatives and made no choice among alternatives. *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W. 2d 903, 906 (Minn. Ct. App. 1995).

In *Garner*, the Memphis police officers were following written municipal policies based upon state law. The municipal policies were consistent with state law, but existed as policies separate and distinct from state law. In the instant case, the Respondent followed state law without any municipal policy expanding, elaborating or adopting the statutory mandates of the state legislation.

The decisions in *Garner* and *Minn. Council of Dog Clubs* are consistent.

The Minnesota Court of Appeals also examined *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989) and the facts in the instant case. *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W. 2d 903, 906 (Minn. Ct. App. 1995). In *Jackson*, a Fifth Circuit case, a sheriff acting pursuant to a state statute was held to be acting under color of state law for purposes of a federal civil rights action regardless of whether state law provided him discretion in carrying out his duties. The sheriff was a state actor. *Jackson*, 868 F.2d at 167-68. The *Jackson* court awarded attorney fees against the sheriff, rejecting the argument that he should not be liable.

Unlike the instant case, *Jackson* addressed individual not municipality liability. Individual liability under § 1983 requires two elements (1) deprivation of a federal right and (2) action under color of law. *Gomez v. Toledo*, 446 U.S. 635, 641 (1980). Municipal liability requires that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 690 (1978).

In *Jackson*, the issue of municipal liability or municipal custom or policy was not presented to or examined by the court, therefore, the decision cannot be in conflict with that of the Minnesota Court of Appeals.

Petitioners final case, *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980), asserted as a basis for a conflict does not involve municipality liability and does not examine the municipal custom or policy standard of *Monell*.

Consumers Union examines the creation, adoption and promulgation of an unconstitutional policy. The defendant, the Supreme Court of Virginia, was absolutely immune from liability. This Court held "that is was an abuse of discretion to award fees" against the Supreme Court of Virginia. *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 738 (1980).

In dicta cited by the Petitioners, this Court indicated that attorney's fees may be awarded against the bar association as the enforcement agency for the unconstitutional regulations. The bar association is equated to an "enforcement official." This Court applied an individual liability analysis, rather than the custom or policy requirements necessary as a foundation for municipal liability.

The Petitioners attempt to articulate a conflict between *Garner* and *Jackson*, and *Bockes v. Fields*, 999 F.2d 788 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994), in the Fourth Circuit, and *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991) in the Seventh Circuit. No conflict exists with *Garner* or *Jackson*.

In *Bockes*, a county board's firing of an individual did not provide the basis for § 1983 liability, because the board merely exercised discretion pursuant to policy established by a state board. "Such bounded, state-conferred discretion is not the 'policymaking authority' for which a county may be held responsible under § 1983." *Bockes*, 999 F.2d at 791. The plaintiff failed to establish a county policy. The county, unlike the Memphis police department in *Garner*, was not exercising choice among various alternatives. The actions of the county in *Bockes* were merely operational, not policymaking. The decision in *Bockes* in consistent with *Garner*.

Similarly, in *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991), the plaintiff failed to establish a custom or policy on the part of the municipality separate and apart from a state statute. The mere fact that a municipality acted pursuant to state statute did not give rise to municipal liability. A municipal policy must consist of more than merely following state law. The court required a choice between alternatives.

There is no conflict among the circuits or between the circuit courts and Minnesota Court of Appeals. Municipal liability requires a custom or policy — a deliberate choice among alternatives. Enforcing a state statute without modification does not constitute a deliberate choice among alternatives. The cases cited by the Petitioners have applied identical criteria to different factual situations and, therefore, reached different conclusions. The cases are consistent in requiring a municipal custom or policy and a choice among alternatives.

II.

PETITIONERS STATE NO CAUSE OF ACTION ARISING UNDER 42 U.S.C. § 1983 AGAINST RESPONDENT.

The Petitioners' claim for attorney's fees is made pursuant to 42 U.S.C. § 1988 which authorizes the awarding of attorney's fees to the prevailing party in a cause of action arising under 42 U.S.C. § 1983. The Petitioners proved no cause of action arising under § 1983 and, therefore, cannot make a claim for fees under § 1988.

Prior to 1978, no municipal liability existed under 42 U.S.C. § 1983. *See Monroe v. Pape*, 365 U.S. 167 (1961). However, in

Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658 (1978), liability under 42 U.S.C. § 1983 was extended to municipalities under limited circumstances. Municipal liability under § 1983 was imposed only where the municipality itself "causes" the constitutional violation. This Court reasoned that § 1983, as originally enacted, imposed liability only if a person "subjected, or caused to be subjected," another person to the deprivation of federally protected rights. *Id.* at 692. By specifically imposing liability for the torts of another person if one "caused" the tort to be committed, the statutory language suggests that Congress "did not intend § 1983 liability to attach where such causation was absent." *Id.* at 693. This Court concluded that it is only when the "execution of a government's policy or custom . . . inflicts the injury" that the municipality may be held liable under § 1983. *Id.* at 695.

This Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. *See, e.g., City of Oklahoma v. Tuttle*, 471 U.S. 808, 824-825 n. 8 (1985), (requiring "affirmative link" between municipal policy and constitutional violation); and, *Polk County v. Dodson*, 454 U.S. 312 (1981), (municipal policy must be the "moving force" behind constitutional deprivation).

Municipalities may be held liable under § 1983 only when the action that is alleged to be unconstitutional implements or executes a municipal policy or custom. The Petitioners challenged no municipal policy or custom. The Petitioners challenged the enforcement of a state statute within the boundaries of the City of Minneapolis by the City of Minneapolis. When a party "failed to allege any policy that arguably violated his rights" he did not state a claim under § 1983. *Id.* at 326. In *Bockes*, the court noted that:

> In his complaints, [plaintiff] not only fails to point to a specific [municipal] policy or

> custom directly or casually linked to the alleged deprivation, but fails altogether to refer to any sort of [municipal] policy or custom linked in any way to the alleged deprivation.

Bockes v. Fields, 999 F.2d 788, 790 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

In the instant case, no municipal ordinance, policy or custom implementing the state statute existed. Municipal enforcement of state law cannot under these circumstances give rise to § 1983 liability. It is only when the municipality adopts a policy different than that mandated by the state that § 1983 liability can be applied to the municipality. The municipality must make a deliberate choice among various alternatives. *Garner v. Memphis Police Department*, 8 F.3d 358 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994).

The mere fact that a municipality acted pursuant to state statute does not give rise to municipal liability. A municipal policy must consist of more than merely following state law. In *Surplus Store & Exchange Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991), the court noted that

> [i]t is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

Id. at 791-92.

The argument that cities can be charged as a matter of policy with accepting state statutes that they do not ignore:

> would render meaningless the entire body of precedent from the Supreme Court and this court that requires culpability on the part of a municipality and/or its policymakers before the municipality can be held liable under § 1983, and would allow municipalities to be nothing more than convenient receptacles of liability for violations caused by state actors. . . .

Surplus Store and Exchange, Inc. v. City of Delphi, 928 F.2d 788, 791 n.4 (7th Cir. 1991). *See also Echos v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) (local official enforcing state statue acting as state official, award of fees against state, not municipality, is proper).

The Petitioners assert that "liability arises because the City followed a policy of enforcing an unconstitutional state law." *Petition for Writ of Certiorari* at 8. This is the logic specifically rejected by the Court in *Surplus Store and Exchange, Inc. v. City of Delphi*. Additionally, no allegation has been made that the City of Minneapolis enforced the state statute after the declaration that the statute was unconstitutional.

A city prosecutor's actions under state criminal law are not attributable to municipal custom or policy. State criminal laws represent the policy of the state. Thus a city official pursues her duties as a state agent when enforcing state law or policy. *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2742 (1994).

The Petitioners alleged no constitutional violation by the City of Minneapolis. The Petitioners proved no constitutional violation by the City of Minneapolis. The Petitioners alleged no enforcement activity that could serve to create individual liability. It is clear that no cause of action existed under 42 U.S.C. § 1983 against the City of Minneapolis, therefore, any claim for attorney's fees based upon 42 U.S.C. § 1988 must fail.

III.

PUBLIC POLICY SUPPORTS A DENIAL OF ATTORNEY'S FEES.

Significant and overriding public policy concerns support the decision of the court below. Municipalities should not be held liable every time they enforce a state law. Allowing attorney's fees to be awarded against a municipality would lead to chaotic and haphazard enforcement of laws of general applicability.

In order to protect itself from liability, a municipality would have to examine every state statute and then decide whether or not to enforce it. This would produce a spotty and chaotic enforcement policy throughout a state.

As noted:

> If every time the courts declared a law unconstitutional, every municipality, every governmental entity in the state with law enforcement powers that had attempted to enforce what they thought to be good law could be sued, the end result is clear. Legislatures would pass no laws; if they did, municipalities would not enforce them.

Minn. Council of Dog Clubs v. City of Minneapolis, 540 N.W. 2d 903, 907, (Minn. Ct. App. 1995) (Randall, J., concurring specially).

The Petitioners public policy concerns are misplaced. The decision of the Minnesota Court of Appeals did not limit the award of attorney's fees when a plaintiff proves a constitutional violation by a municipality. The Minnesota Court of Appeals did not limit attorney's fees when a statute is being enforced against a plaintiff by a named defendant.

The Petitioners' cause of action was brought pursuant to the Uniform Declaratory Judgment Act, Minn. Stat. §§ 555.01-.16, which provides authority to challenge the constitutionality of statutes independent of 42 U.S.C. § 1983. The only reference in the Complaint of the Petitioners to 42 U.S.C § 1983 relates to the definition of "under color of state law." The Petitioners asserted no municipal policy or custom. The court below noted that "Appellants sought a ruling under the Uniform Declaratory Judgements Act, Minn. Stat. § 555.01-.16 (1992) that certain provisions of the Cruelty to Animals Act violate the privileges of due process and the right to a fair trial as guaranteed the United States and Minnesota Constitutions." *Minnesota Council of Dog Clubs v. City of Minneapolis*, No. C3-94-939, 1994 WL 593912 at *2 (Minn. Ct. App. Nov. 1, 1994). Pet. App. 20-21.

Throughout litigation, the Petitioners have asserted causes of action challenging the constitutionality of Minnesota Statutes solely upon the authority of the Uniform Declaratory Judgment Act. The Petitioners first attempt to frame a cause of action pursuant to § 1983 arose with their request for attorney's fees. Allowing attorney's fees to be awarded when no cause of action was asserted or proved under 42 U.S.C. § 1983 would be against public policy.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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